

Changes to Proposed Regulation
February 11, 2000

Section 19041 is adopted to read:

§19041. Protest.

(a) General.

(1) A taxpayer has the right to file a protest with respect to a deficiency proposed to be assessed by a Notice of Proposed Assessment. The department shall review and act upon the protest based upon a determination of whether the proposed deficiency is correct, in whole or in part. This regulation sets forth and makes specific the rules for filing, considering and determining a protest.

(2) The protest process is intended to be informal. It is the first step in the administrative and judicial review process where the taxpayer can dispute proposed adjustments to increase or determine the taxpayer's tax for a particular year. It provides an opportunity for an employee of the Franchise Tax Board and the taxpayer to discuss the issues involved and to make sure that all of the necessary facts to resolve the protest have been presented. The protest hearing process is not subject to the requirements of the administrative adjudication provisions of the Administrative Procedures Act, sections 11400 et seq. Of the California Government Code. Subsequent steps in the administrative and judicial review protest are more formal. These other steps involve adjudicative bodies other than the Franchise Tax Board. In those proceedings the evidence admitted and the testimony given become part of the formal record of the proceedings maintained by the adjudicative body.

(3) The staff member of the Franchise Tax Board handling the protest is charged with the responsibility of making a determination of the correct amount of tax based upon the facts and a correct application of the law to the taxpayer. The protest process is not a negotiation where disagreements are compromised. There is a separate Administrative Settlement process which allows for taxpayers and the Franchise Tax Board to reach an agreement as to the settlement of a dispute based upon the various risks that are involved. See Revenue and Taxation Code section 19442.

(4) A taxpayer may file a protest contesting the specific adjustment proposed by the Franchise Tax Board or raising other issues in an effort to show that the proposed tax is not owed. In all circumstances the taxpayer must show why the calculation of the tax proposed to be assessed by the department is incorrect either factually or as a matter of law.

(5) In most circumstances the Franchise Tax Board will only be in possession of facts which have been supplied by the taxpayer. Not all of the

facts may have been made available prior to the issuance of the Notice of Proposed Assessment. The taxpayer has the burden of establishing error in the proposed assessment of tax. It is the taxpayer that will be in possession or control of the necessary books and records and who will have the knowledge regarding the circumstances of the relevant activities such that a determination of the correct tax can be made. The inability, or failure, of a taxpayer to supply information can result in a proposed assessment being sustained. The Franchise Tax Board is entitled to conclude that the failure to produce information gives rise to an inference that the information if provided would support the proposed assessment.

(6) The regulation sets forth specific rules that govern the protest process based upon the language of the statute. The regulation provides a number of specific rules and time limits, with specific exceptions. These rules, time limits and exceptions are provided for the protection of taxpayers. They are intended to inform taxpayers of their rights and provide protections in a number of circumstances. In virtually every situation the department is provided the discretion to waive rules or grant extensions. It is the goal of the department to resolve disputes with taxpayers concerning their tax liability at the lowest level possible in the administrative process and the Franchise Tax Board will liberally exercise its discretion in all areas provided for in the regulation with this goal in mind.

(7) The rules and time limits in the regulation are not intended to be used to foreclose or limit a taxpayer's access to the protest process. They are intended to provide an orderly process that leads to a quick resolution of the disagreement. They will be invoked to limit the protest process, only after a notice has been given, and when necessary for the timely and efficient completion of the protest process.

(8) A taxpayer may, either in conjunction with filing a protest or subsequent to the filing of a protest, pay all or part of the amount that the Franchise Tax Board has proposed to assess, or make a deposit in the nature of a cash bond. By operation of statute, Section 19335 of the Revenue and Taxation Code, the protest is converted to a Claim for Refund. Where the taxpayer designates in writing in a statement attached to or submitted together with the payment that the payment is intended as a cash bond and not a payment of tax, Section 19041.5 of the Revenue and Taxation Code shall apply and the deficiency remains under protest. Classification of a filing as a Claim for Refund gives rise to different rights and remedies and has procedural consequences that may limit rights in subsequent proceedings. A taxpayer should make themselves aware of these consequences. Where the grounds raised by the taxpayer in a protest may result in a reduction in tax in excess of the additional amount proposed to be assessed, the protest letter must alert the Franchise Tax Board that an overpayment is being claimed in addition to the fact the deficiency is being protested for a refund to be allowed. In that circumstance

the protest will also be treated as a claim for refund whenever the protest is filed within the statutory period permitted for filing a claim for refund.

(b) Time for Filing a Protest.

(1) Beginning of Period. A protest is timely if filed with the department on or before the later of 60 days after the mailing of the Notice of Proposed Assessment to which it relates or the date determined by the Franchise Tax Board as the last day specified for filing the protest that appears on the Notice of Proposed Assessment. The department shall treat the date of mailing of a Notice of Proposed Assessment as the date that appears on the Notice of Proposed Assessment. The taxpayer may prove that a different day was the date of the mailing of the Notice of Proposed Assessment. The postmark on the envelope in which the Notice of Proposed Assessment is an example of proof that the Notice of Proposed Assessment was mailed on a different day.

(2) End of Period. A protest is timely filed if it is mailed to or hand-delivered to an office of the department within the later of 60 days after the date of the mailing of the Notice of Proposed Assessment or the date determined by the Franchise Tax Board as the last day specified for filing the protest that appears on the Notice of Proposed Assessment. If the 60th day falls on a Saturday, Sunday or holiday, the last day for filing the protest is the next business day.

(3) Establishing Date of Filing. The date of the filing of a protest may be established by the postmark on the envelope in which it was mailed, proof of mailing from the postal service, an affidavit of mailing or service, or a dated receipt of delivery signed by an employee of the department or other competent evidence. The department does not retain the envelope in which the protest was mailed in the normal course of business.

(4) Postal Service. For purposes of filing a protest, any reference to mail or postal service shall include United States mail, the postal system of any foreign country, or any designated delivery service as designated by the Secretary of the Treasury of the United States under the authority of Section 7502(f) of the Internal Revenue Code.

(c) Manner of Filing. A protest is normally filed by mailing it to the address that appears on the reverse side of the Notice of Proposed Assessment. A protest may also be filed by hand-delivering it to an office of the Franchise Tax Board.

(d) Form.

(1) Writing. A protest must be in writing and must indicate that a protest is being made against the proposed assessment that appears on the Notice(s) of Proposed Assessment. No special form is required for filing a protest. A date on

a protest shall be treated as the date of filing unless there is other evidence, such as a postmark on the envelope in which a protest was mailed, to indicate that the protest was filed on a different date.

(2) Contents. The protest shall set forth:

(A) the name of the taxpayer or taxpayers,

(B) the taxpayer's or taxpayers' identifying number(s) (Social Security number of individuals or federal identification number for entities, such as corporations, estates and trusts, or partnerships),

(C) the current address of the taxpayer(s) or the taxpayer's representative to which correspondence concerning the protest should be directed,

(D) the amount(s) being protested,

(E) the year(s) to which the protest is directed,

(F) the identifying number(s) that appear(s) on the Notice(s) of Proposed Assessment,

(G) the date of the Notice(s) of Proposed Assessment, and

(H) if the taxpayer(s) files a protest more than sixty days after the date of the Notice of Proposed Assessment or after the date determined by the Franchise Tax Board as the last day specified for filing the protest that appears on the Notice of Proposed Assessment, a statement of the reason why the filing is timely.

(3) Oral Hearing. A request for an oral hearing on the protest must be expressly stated and must be included as part of the protest. The right to an oral hearing is waived if a request is not included in the protest; however, the department may at its discretion grant an oral hearing requested after the protest has been filed. See Regulation section 19044.

(4) Signed. The protest must be dated and signed by the taxpayer(s) or by an authorized representative.

(5) Grounds and Reasons. The protest must specify the grounds upon which it is based, set forth the facts involved, and the reason(s) why the proposed assessment is in error. See subsection (e) of this regulation for rules relating to grounds.

(6) Legal Authorities. The protest should include any legal authorities relied upon by the taxpayer(s), including relevant statutes, regulations, rulings, and administrative or judicial decisions.

(e) Grounds.

(1) No Limitation on Grounds for Filing a Protest. A protest may raise objections to the proposed assessment based upon any grounds. A protest shall not be limited to objections to the adjustments made by the Notice(s) of Proposed Assessment.

(2) Limited to Grounds in Protest Letter. Except as otherwise provided in this regulation, a protest shall be limited to the grounds set forth in the protest letter. The department shall have the discretion to inquire into or allow the introduction of new, additional or alternative grounds to determine whether the proposed assessment is correct in whole or in part. The department's discretion in this respect shall be liberally construed with the view to allowing the taxpayer to present new grounds consistent with timely and efficient tax administration.

(3) New, Additional or Alternative Grounds. A new, additional or alternative ground includes a different ground or one that alters an objection to the Notice of Proposed Assessment contained in the protest. Assertions that clarify or develop the protest that are consistent with the protest are not a new, additional or alternative ground.

(4) Requests to Amend.

(A) The department shall accept a request to amend the protest to set forth new, additional or alternative grounds if:

1. it is part of the response to a request by the department to perfect a protest pursuant to subsection (f)(3) of this regulation, or to provide additional information or authorities pursuant to subsection (g) of this regulation; or

2. it is submitted at least fourteen (14) days prior to the date of the first scheduled oral hearing on the protest, if an oral hearing has been requested.

(B) The department, at its discretion, may grant a request to amend the protest when:

1. in the case of a taxpayer that has requested an oral hearing, the request is submitted less than 60 days prior to the oral hearing.

2. in the case of a taxpayer who has not requested an oral hearing, the request is received by the department prior to the date a Notice of Action on the protest was issued.

3. The taxpayer shows reasonable or good cause for allowing an amendment.

(C) A taxpayer submitting a new, additional or alternative ground must provide facts and authorities in support of the ground with the request.

(D) The department's discretion in this respect shall be exercised liberally with the view to allowing the taxpayer to present new, additional, or alternative grounds consistent with timely and efficient tax administration.

(5) Amendment as a Claim for Refund. Amending a protest to add new, additional or alternative grounds, or to change the grounds upon which a protest is made, shall, to the extent it may give rise to a refund and is identified as a claim, be treated as filed as of the date of the amendment for purposes of determining whether or not it is a timely filed claim for refund. See Revenue and Taxation Code sections 19306 through 19313, and the regulations adopted pursuant thereto.

(6) Failure to Raise Grounds in a Protest. Failure to raise an issue in a protest does not prejudice a taxpayer's right to raise the issue in an appeal to the State Board of Equalization or to file a claim for refund with respect to the issue.

(f) Perfecting a Protest.

(1) Perfecting a Protest. A protest that does not contain all of the information required by subsections (2), (4), and (5) of subsection (d) of this regulation must be perfected or it is not a valid protest.

(2) Procedures. Except as provided in subsection (e) of this regulation:

(A) A taxpayer who has not requested an oral hearing in the original protest may perfect a timely filed protest by submitting any missing information. Submission must be within 60 days of the filing date of the protest.

(B) Except as limited by subsection (3) of this subsection, a taxpayer who has requested an oral hearing may perfect a timely filed protest by submitting the information missing from the protest prior to the conclusion of the oral hearing or such extended time as may be granted by the department.

(3) Franchise Tax Board Request to Perfect.

(A) Determination of Need. Upon review of the protest, the department may determine that it is incomplete and needs to be perfected. The department shall notify the taxpayer, or the taxpayer's representative, of its determination and specify how the protest needs to be perfected.

(B) Notification. A need to perfect a protest does not arise unless and until the taxpayer, or the taxpayer's representative, is notified by mail by the department that the protest is incomplete and needs to be perfected.

(C) Time to Perfect. A period, thirty days after the notice described in (B) of this subsection is mailed, will be presumed to be sufficient time to perfect a protest. An extension of 15 days will be granted if requested prior to the expiration of the 30 days. An additional extension of time to perfect the protest may be granted, if requested prior to the expiration of the original 30 days or a fifteen-day extension, in limited circumstances. The granting of an additional extension is at the discretion of the department. A taxpayer has the burden of establishing why any additional time to perfect the protest is necessary.

(D) A taxpayer, or the taxpayer's representative, who has been notified to perfect a protest may provide information and legal authorities in addition to the specific information requested by the department to perfect the protest. Such additional information and authorities will be considered by the department in determining the protest.

(4) Action on Nonperfected Protest. A protest that has not been timely perfected shall be acted upon through the issuance of a Notice of Action on the protest as provided for in subsection (h)(2) of this regulation.

(g) Request of Department for Additional Information or Authorities.

(1) Right to Request. In order to make its determination with respect to the protest, the department may request additional information or authorities regarding the grounds raised in the protest. A request for additional information or authorities may be made either in writing or during the course of an oral hearing. See Regulation section 19044(h)(9).

(2) Duty to Respond. A taxpayer, or the taxpayer's representative, has the duty to make a timely and complete response to any requests for additional information or authorities by the department pursuant to subsection (1) above.

(A) Time for Response. A request for additional information or authorities by the department shall include a due date for a timely response. The period for response shall not be less than 30 days from the date of the request unless otherwise agreed to by the taxpayer, or the taxpayer's representative, and the department.

(B) Extensions. One extension of time to submit the requested information or authorities will be granted if requested. The period of extension shall not be less than one half the period of time allowed for response in subsection (A) above.

(C) Additional Time. In its discretion, the department may grant extensions of time to respond in addition to the periods provided for in subsection (B) above.

(3) Failure to Respond.

(A) Failure to provide a timely and complete response to a request from the department for additional information or authorities can result in the protest being determined by resolving questions of fact to which the requests relate against the taxpayer. In addition, failure to provide a timely and complete response may give rise to an assertion by the department that the taxpayer has failed to exhaust administrative remedies in subsequent administrative or judicial proceedings.

(B) The department will advise a taxpayer of its determination that the taxpayer has failed to respond or has failed to provide an adequate response. The department will specifically advise the taxpayer of the extent to which it has determined that the response is inadequate. The taxpayer will be given not less than thirty (30) days to make the response adequate.

(h) Determination on Protest.

(1) Letter of Determination and Notice. The department shall provide to the taxpayer, or the taxpayer's representative, a written Notice of Action setting forth the determination that has been made with respect to the protest. If an oral hearing had been requested on the protest, the department shall also provide the taxpayer, or the taxpayer's representative, with a letter setting forth its determination, unless the receipt of a separate letter is waived in writing or orally. If a letter of determination has been sent to the taxpayer, or the taxpayer's representative, setting forth the basis of the determination, the Notice of Action issued with respect to the protest may set forth the determination by reference to the letter. A taxpayer may appeal the department's determination on its protest, as reflected on the Notice of Action, to the California State Board of Equalization within the time limits provided by the Revenue and Taxation Code. See Revenue and Taxation Code sections 19045 and 19324, and the regulations adopted pursuant thereto.

(2) Notice for Purposes of Appeal. The date from which an appeal to the California State Board of Equalization can be taken begins on the date of the mailing of the Notice of Action issued with respect to the protest. The Notice of Action is a document separate and distinct from a letter of determination. The

Franchise Tax Board will treat the date on the Notice of Action as the date of mailing of the Notice of Action. A Notice of Action issued after January 1, 2000, shall include the date determined by the Franchise Tax Board as the last day on which the taxpayer may file an appeal to the State Board of Equalization. Subject to the procedures of the State Board of Equalization, the taxpayer may prove that a different day was the date of the mailing of the Notice of Action. The postmark on the envelope in which the Notice of Action was mailed is an example of proof that the Notice of Action was mailed on a different day.

Note: Authority Cited: Section 19503, Revenue and Taxation Code. Reference: Section 19041, Revenue and Taxation Code.